1991

Pratt v. Prodata : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

JOHN P. PRATT, Plaintiff/Appellee, vs. PRODATA, INC. and WILL McCOY, Defendants/Appellants.	Case No. 910248 Priority No. 16

Appeal from Third District Court, Salt Lake County, Utah
Honorable J. Dennis Frederick

BRIEF OF APPELLANTS

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3. Trial Exhibit 4. Neal Christensen Summary of "DP Contract Issue."

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TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES

1. Did the district court commit error in failing to enter judgment in favor of the defendants-appellants Prodata, Inc. ("Prodata") and Will McCoy ("McCoy") as a matter of law based on the jury's finding that the defendants conveyed only truthful information?

Standard of Review: Trial court's determination as to issues of law is accorded no deference and will be reviewed for correctness. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989).

2. Viewed in the light most favorable to the plaintiff-appellee John P. Pratt ("Pratt"), was the evidence at trial sufficient to support the jury's finding that, in contacting the Utah Department of Transportation (" UDOT"), Prodata and McCoy acted with a predominant purpose to injure Pratt for the sake of injury alone?

Standard of Review: Sufficiency of the evidence when viewed most favorably to the prevailing party. Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

3. Viewed in the light most favorable to Pratt, was the evidence at trial sufficient to support the jury's finding that the acts of Prodata and McCoy were the proximate cause of the damages awarded to Pratt?

Standard of Review: Depending on whether this is viewed as an issue of law or fact, the standard of review is either that set forth in Ron Case Roofing, supra, or in Hansen, supra. See Bennion v. LeGrand Johnson Construction Co., 701 P. 2d 1078, 1083 (Utah 1985).

4. Viewed in the light most favorable to Pratt, was the evidence at trial sufficient to support the jury's finding that, in contacting UDOT regarding their rights under the Agreement, Prodata and McCoy failed to act in good faith thereby losing any privilege that might otherwise have protected their actions?

Standard of Review: Sufficiency of the evidence when viewed most favorably to the prevailing party. Hansen, supra.

5. Viewed in the light most favorable to Pratt, was the evidence at trial sufficient to support the jury's finding that Pratt did not recognize the risk of harm to himself by reason of the actions of Prodata and McCoy and thereafter intentionally or heedlessly failed to protect his own interests?

Standard of Review: Sufficiency of the evidence when viewed most favorably to the prevailing party. Hansen, supra.

6. Viewed in the light most favorable to Pratt, was the evidence at trial sufficient to support the jury's finding that Prodata suffered no damage as the result of Pratt's breach of the Agreement?

Standard of Review: Sufficiency of the evidence viewed most favorably to the prevailing party. Hansen, supra.

DETERMINATIVE LAW

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of the issues listed above.

STATEMENT OF CASE

I. Nature of Case

Pratt filed this action against Prodata, his former employer, and McCoy, its agent, seeking recovery of damages Pratt allegedly suffered when UDOT discharged him as a contractor supplying data processing services. As his theory of recovery, Pratt alleged that Prodata and McCoy had intentionally interfered with Pratt's economic relations with UDOT both by employing an improper means (misrepresentation of facts) and by acting with an improper purpose. Pratt also sought a declaratory judgment that he was not bound by a covenant not to compete he had entered into with Prodata. (R. 2-13.)[1]

Prodata and McCoy answered Pratt's Complaint by denying that they had made any misrepresentation or that they had acted with an improper purpose. Further, Prodata denied that Pratt was relieved in any way of his obligations under the covenant not to compete. As to the allegations of intentional

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[1] All references to the original record are in the following form: "R." followed by the page number. All references to the Reporter's Transcript of Trial Proceedings are in the following form: "T." followed by the page number. Trial exhibits are designated as follows: "Ex." followed by the exhibit number. Finally, items included in the Addendum to this brief are referenced first by their source in the record and, thereafter, by their order in the addendum ("Addendum ___").

interference with economic relations, Prodata raised as affirmative defenses both privilege and Pratt's intentional failure to protect his own interest. Prodata also brought a Counterclaim seeking recovery of liquidated damages in the amount of $25,000 for violation of the covenant not to compete. (R. 90-104.)

II. Course of Proceedings

This matter was tried to a jury on March 19-21, 1991. At the conclusion of Pratt's case, Prodata moved for directed verdict on both claims. (T. 380-408.) The motion was granted as to Pratt's declaratory judgment claim. (R. 756-58 appended hereto as Addendum 4.) Following the jury's verdict in favor of Pratt on both the wrongful interference claim and on the Counterclaim, Prodata and McCoy made a timely motion for judgment notwithstanding verdict or, in the alternative, for new trial. (R. 765-67.)

III. Disposition in Trial Court

The jury found that Prodata and McCoy, acting with an improper purpose, had interfered with Pratt's economic relations with UDOT and that the amount of Pratt's damages was $32,380.00. However, the jury found that neither defendant had employed improper means by making a false statement to UDOT regarding Pratt. The jury found that the acts of the defendants were not privileged. The jury further found that Prodata had not suffered any damages by reason of Pratt's breach of his covenant not to compete. (R. 700-04 also appended hereto as Addendum 5.)

On March 27, 1991, judgment was entered in favor of Pratt in the amount of $34,566.85. On May 20, 1991, the trial court denied the defendants' Motion for Judgment Notwithstanding Verdict or, in the Alternative, for New Trial. This appeal was noticed on May 21, 1991.

IV. Statement of Facts

A. Background--The Parties and the Covenant Not to Compete

Pratt is a computer programmer. The business of Prodata (known in Utah as "Pro-Star") is to supply computer programmers to industry and governmental entities in need of such services. McCoy is Prodata's City Manager for Salt Lake City. (T. 3, 14 and 127.)

In September, 1985, Pratt went to work for Prodata and, on September 23, 1985, he signed a "Non-Disclosure/Non-Compete Employment Agreement" with Prodata. (T. 14-15; Ex. 11 appended hereto as Addendum 1.) The Employment Agreement included a covenant by Pratt not to compete with Prodata as a contractor in Salt Lake City for a period of one year after termination of his employment.[2] As the exclusive remedy for violation of its terms, the covenant not to compete provided for liquidated damages in the amount of $25,000. (Addendum 1 at paragraph 9.) While employed under the terms of the Employment

[2]The trial court found that Pratt's covenant not to compete was valid and enforceable and that it had not been modified or superseded. These findings have not been challenged on appeal. (Addendum 4 at p. 2; R. 742 [Jury Instruction No. 33] appended hereto as Addendum 8.)

Agreement, Pratt performed services at UDOT for Prodata. (T. 51, 52, 322.)

On May 1, 1988, Pratt terminated his employment with Prodata. (Pratt continued to work for Prodata for some time thereafter under a separate subcontract arrangement.) (T. 15, 18-19.) On February 27, 1989, two months before the expiration of his covenant not to compete, Pratt commenced working for UDOT in Salt Lake City. (T. 23-24.) Between that date and May 1, 1989, Pratt worked 227 hours for UDOT in violation of the covenant not to compete charging UDOT a rate of $45.00 per hour (versus the $26.50 per hour Prodata paid Pratt). (T. 60-61; Ex. 2.)

B. Background--Pratt and Hartle at UDOT

Pratt continued to work at UDOT through October 2, 1989.[3] (T. 2.) Ronald J. Hartle ("Hartle"), under subcontract with Prodata and like Pratt subject to a covenant not to compete, also worked as a computer programmer at UDOT in the summer of 1989. (T. 281, 285, 288.) In the summer of 1989, in violation of his covenant not to compete with Prodata, Hartle signed a contract for services directly with UDOT. Prodata became aware of Hartle's contract with UDOT in September, 1989 when Hartle refused to turn in his August time sheets so that Prodata could bill his time to UDOT. (T. 285-86.)

[3]The evidence showed that Pratt did not have a written contract with UDOT as of late September, 1989 although he continued to work at UDOT. (T. 154; Ex. 6 appended hereto as Addendum 2 at paragraph 7.)

Between September 7 and 26, 1989, Prodata through McCoy had numerous contacts with UDOT and Hartle regarding Hartle's breach of his covenant not to compete. (Ex. 4 appended hereto as Addendum 3 at pp. 5-6; T. 286, 329-30.) UDOT was a client of Prodata and Prodata did not wish to take action regarding Hartle's covenant not to compete that would adversely affect UDOT. (Addendum 2 at paragraph 4; T. 52, 330.) On September 26, 1989, Prodata received a letter from Hartle's attorney citing Prodata's failure to enforce Pratt's covenant not to compete between February 27 and May 1, 1989 as partial justification for Hartle's breach. (T. 137; Ex. 15 at p. 2.) That very day, McCoy visited UDOT to review the contract documents between UDOT and both Pratt and Hartle. (T. 138-39.) Once he had reviewed these documents, McCoy requested a meeting with Harold Worrall ("Worrall"), UDOT's Comptroller, and Neal Christensen ("Christensen"), UDOT's Director of Administrative Services. (T. 144-45.)

C. The Offending Contact

On September 27, 1989, McCoy met with Christensen. During the course of the meeting, Worrall joined them.[4] McCoy advised Christensen that Prodata's agreements with both Pratt and Hartle contained covenants not to compete. McCoy further

[4]At the time, Christensen recorded what occurred at this and other meetings relating to the Pratt/Hartle problems in which he participated. (T. 211-12.) These notes were admitted in evidence at trial as Exhibit 4 and, as already noted, are appended to this brief as Addendum 3.

indicated that UDOT may have contracted with Pratt and Hartle before their non-compete obligations to Prodata had expired. McCoy "emphasized that it was not the intent of [Prodata] to legally or formally involve [UDOT] in this issue." (T. 144-46; Addendum 3 at p. 1.) Worrall agreed to review the documentation relative to the UDOT contracts with Pratt, Hartle and Prodata in order to advise Christensen of UDOT's position. (T. 357-59.) (This was the defendants' only contact with those at UDOT who participated in the decision to conditionally discharge Pratt and Hartle on the subject of Pratt before the decision to discharge was made. [Addendum 3.])

D. UDOT's Decision

Worrall prepared a two-page memorandum discussing the Pratt and Hartle contracts with UDOT.[5] This memorandum was presented to UDOT Director Eugene H. Findlay at a meeting held on September 29, 1989 and attended by Worrall, Findlay, and Christensen. (T. 358-60.) Among other things, the memorandum stated that the procedures followed by UDOT in selecting, contracting with, and paying Pratt "invalidate[d] the competitive procurement and violated procurement practices in the State of Utah." (Pratt's UDOT contract ran only from April 27, 1989 through June 30, 1989 while he had worked and been paid for a period from February 27, 1989 through August 31, 1989.) (Addendum 2 at p. 2.)

[5]The memorandum was admitted at trial as Exhibit 6 and, as previously noted, is appended hereto as Addendum 2. (T. 360.)

Following his discussions with Christensen and Worrall, Findlay concluded that Pratt and Hartle should be discharged until the two gentlemen had resolved any differences they might have with Prodata arising from violation of their covenants not to compete. (Addendum 3 at pp. 3 and 4; T. 93-98, 220-22.) Findlay took full responsibility for the decision. (T. 110.) Findlay never met with McCoy or Pratt before making the decision. (T. 92-93, 110.) Christensen was charged with obtaining approval of the proposed discharges from the Attorney General's office. To that end, he spoke that same day with Lee Ford ("Ford") of the Attorney General's office. Ford agreed that UDOT could proceed in the manner proposed by Findlay. (Addendum 3 at p. 4; T. 224-25, 299-301.)

On September 29, 1989, Christensen spoke for a second time with McCoy. (T. 225-29.) Christensen did not advise McCoy of the decision made by Findlay. (T. 148-50.) Nor did Christensen and McCoy discuss how Pratt and Hartle should be treated. (T. 221.) Rather, Christensen sought and obtained from McCoy additional facts regarding Prodata's contractual relations with Hartle and Pratt. (Addendum 3 at pp. 5-6; T. 225-29.)

E. **Aftermath**

On October 2, 1989, Christensen advised Pratt, Hartle and Prodata of its decision to discharge them. (T. 2-4, 88.) Pratt and Hartle were assured that they could return to work once they had resolved their differences with Prodata regarding the covenants not to compete. (T. 3.)

Hartle promptly reached a compromise with Prodata and returned to work. (T. 290-92.) Pratt, although acknowledging that he had worked for two months in violation of the covenant not to compete, declined to negotiate even the slightest compromise. (T. 58, 64-65.) As a consequence, he never returned to work at UDOT. Instead, he brought this legal action against Prodata. (T. 65-66, 68.)

SUMMARY OF ARGUMENTS

1. Truthful Information

Pratt bases his claims of intentional interference exclusively on McCoy's transmission of information to UDOT. The jury found that McCoy spoke truthfully in suggesting to UDOT that Pratt may have breached his covenant not to compete. The communication of truthful information, as a matter of law, cannot be the basis for a claim of intentional interference with economic relations.

2. Improper Purpose

The only evidence at trial of McCoy's state of mind was circumstantial. That evidence established that McCoy proceeded with the consistent purpose to enforce the covenant not to compete for the economic benefit of Prodata. The evidence at trial was not sufficient to support an inference that McCoy and Prodata acted with a predominant purpose to inflict injury on Pratt for the sake of injury alone.

3. Proximate Cause

The evidence did not suffice to support a finding of proximate cause. By his own admission, Pratt refused to negotiate a settlement with Prodata that would allow him to return to work at UDOT. As a matter of common sense and public policy, Pratt was the sole legal cause of his damages.

4. Privilege

The covenant not to compete was valid and enforceable. Prodata and McCoy acted in good faith in asserting their rights under that covenant. The evidence at trial did not suffice to establish that the defendants lacked the requisite "honesty in fact."

5. Avoidable Consequences

Pratt rejected any compromise of his differences with Prodata based on an erroneous understanding of the enforceability of the covenant not to compete. By his own admission, he did so with full awareness of the consequences. The evidence at trial did not suffice to place the burden of Pratt's miscalculation on Prodata and McCoy.

6. Liquidated Damages

Pratt offered no evidence to establish either that Prodata suffered no damages as the result of his breach of the covenant not to compete or that the liquidated damages set forth in the covenant bore no reasonable relationship to contemplated compensatory damages. Prodata should prevail on its Counterclaim.

ARGUMENT

I. A JUDGMENT FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS CANNOT BE BASED ON THE TRANSMISSION OF TRUTHFUL INFORMATION.

The only act of interference alleged in the Complaint or proven at trial was McCoy's September 28, 1989 statement to UDOT that Pratt was bound by, and might have violated, a covenant not to compete. In Question 3(a) of the Special Verdict, the jury found that the defendants did not "make a false statement about a presently existing fact" to UDOT.[6] In other words, the information transmitted by McCoy on which Pratt rested his claim was truthful. In light of this finding, the trial court should have entered judgment in favor of the defendants on Pratt's claim of intentional interference with economic relations.

Restatement (Second) of Torts § 772(a) (1979) states the following black letter rule:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . truthful information. . . .

(Emphasis added.)

Comment 6 to Section 772 states: "There is of course no liability for interference with a contract or with a prospective

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[6]The trial court had earlier found that the covenant not to compete, the principal subject matter of McCoy's contact with UDOT, was valid, enforceable and had not been modified or superseded. (Addendum 4 and 8.)

contractual relation on the part of one who merely gives truthful information." See also Allen v. Safeway Stores, Inc., 699 P.2d 277, 280 (Wyo. 1985) (state employee's truthful report of other employee's bad attitude not actionable).

In Prazma v. Kaehne, 768 P.2d 586 (Wyo. 1989), the court held that the plaintiffs had no perscriptive easement, then determined that the plaintiffs' claim of interference based on the defendants' representation to a third party that such an easement did not exist must fail as a matter of law. The court stated: "[W]hether solicited or volunteered, truthful statements are not actionable for tortious interference with a contract or prospective contractual relationship." 768 P.2d at 590. See also Four Nines Gold, Inc. v. 71 Construction, Inc., 809 P.2d 236 (Wyo. 1991) (under Restatement (Second) § 772(a), subcontractor's truthful disclosure of a bid mistake could not constitute improper interference with the relationship between general contractor and owner). All Prodata and McCoy ever did was tell UDOT the truth about Pratt's breach of the covenant not to compete and the deficiencies in UDOT's handling of Pratt's contract. Such statements, being truthful, are not actionable.

In Liebe v. City Financial Co., 98 Wis.2d 10, 295 N.W.2d 16 (Wis. App. 1980), the trial court granted judgment notwithstanding a jury verdict awarding compensatory and punitive damages to a plaintiff in an action for intentional interference with contract. The defendants had truthfully disclosed to the plaintiff's finance company employer his

connection to a book criticizing the cost of finance company loans. In sustaining the trial court's granting of judgment notwithstanding verdict, the appellate court concluded:

> We hold that the transmission of truthful information is privileged, does not constitute improper interference with a contract, and cannot subject one to liability for tortious interference with a contract.
>
> 295 N.W. 2d at 18.

In this action, the jury found the essential factual predicate for application of the rule set forth in Restatement (Second) § 772(a), the Wyoming precedents, and Liebe, supra. There is profound incongruity in the present status of this action wherein Prodata, having a valid covenant not to compete subject to no defenses, and McCoy, having spoken truthfully to UDOT, are nonetheless deemed liable to Pratt for intentional interference. Such a result is contrary to law and the judgment based on the jury's verdict should be set aside.

II. THE EVIDENCE AT TRIAL WAS NOT SUFFICIENT TO SUPPORT A FINDING THAT THE DEFENDANTS ACTED WITH AN "IMPROPER PURPOSE."

The case of Leigh Furniture and Carpet Co. v. Isom, 657 P. 2d 293 (Utah 1982) sets forth the elements of the tort of intentional interference with economic relations as follows:

> (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.
>
> 657 P. 2d at 304.

As to the second element, the jury found that Prodata and McCoy did not employ "improper means." However, the jury did find that the defendants acted with an "improper purpose." As defined in Leigh Furniture (and in Jury Instruction No. 18 at trial [R. 725, appended hereto as Addendum 6]), proof of an "improper purpose" has two components: (1) proof of an intent to injure Pratt as "an end in itself" or "for the sake of injury alone," and (2) proof that this intent "predominated" over all other legitimate motives. 657 P.2d at 307-08. "[O]bjectional short-run purposes . . . eclipsed by legitimate long-range economic motivation" will not suffice as proof of an "improper purpose." 657 P.2d at 307.

A. Evidence of the Defendants' Intent

This Court has held:

> To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings.
>
> Scharf v. BMG Corp.,
> 700 P.2d 1068, 1070 (Utah 1985)

See also Crookston v. Fire Insurance Exchange, ___ P.2d ___, 164 Utah Adv. Rep. 3, 7 (Utah, June 28, 1991). The only witnesses to McCoy's contact with UDOT who testified at trial were McCoy himself, and UDOT officials Christensen and Worrall. (McCoy never met with Findlay, the person who made the decision to discharge Pratt.) None of these witnesses offered direct evidence that the defendants acted with an improper purpose.

Further, the facts provided by these witnesses, all of which were undisputed, do not provide any circumstantial evidence of an improper purpose (nor has Pratt ever argued that they do.)[7]

For evidence that might support an inference of improper purpose, Pratt must look to the testimony of six former Prodata employees: Pratt, Christopher Crocker, Roger Clawson, Glen Read, Charles Christensen, and Ronald Hartle.

1. John P. Pratt--Pratt gave no testimony that would support an inference of improper purpose. (T. 87-88.) His only post-February, 1989 contact with McCoy came on October 5, 1989 after Pratt was discharged. Pratt has never contended that McCoy's conduct at that meeting--in which McCoy offered Pratt a basis for compromise and Pratt rejected it--is evidence of an improper purpose.

2. Christopher Crocker--Crocker offered the following testimony that might be deemed to bear on McCoy's state of mind (this testimony is reproduced in Addendum 9):

> The statement I received from Mr. McCoy was that I was to stay away from John Pratt and another gentleman that happened to be out there [at UDOT], Ron Hartle.
>
> * * *
>
> I asked who the gentlemen were. It was indicated to me that they were people that prior to that point had been referred to namelessly either in

[7]The other UDOT employees called a trial--Findlay, Ford, Lorin Sheffield, Sharon Holland and Alan McEwan--testified either as to their role in making the decision to discharge Pratt or their knowledge of facts relating to Pratt's alleged damages. Thus, they provided no evidence of McCoy's intent.

other casual conversations at our monthly luncheons or, you know, kicked around the office. . . . I knew they were referred to previously because everyone was basically informed that two contractors had taken contracts away from Pro-Star and their names were not mentioned, and I don't know why I wasn't privy to that until I was to go to UDOT. Then it became imperative that I knew who they were so that I could stay away from them. . . . It wasn't explicit [why I should stay away]. Basically every contractor that goes to work for Pro-Star signs a no compete clause. Being informed that John Pratt and Ron Hartle had taken contracts away from Pro-Star means they violated, you know, that compete clause, so to me, it was clear that you stay away from them because they had violated their contractual agreements.

* * *

[In October, 1989,] I saw John Pratt and, to the best of my knowledge, Ron Hartle go into Will McCoy's office and the doors were shut. Some discussion went on that I have no knowledge of.

* * *

After the meeting, Mr. McCoy came out and basically addressed the individuals that were present, indicating that Mr. Pratt was going to give up his contract at UDOT and pay some form of restitution. . . . In my opinion, [when McCoy came out of the meeting] he was quite pleased. He was smiling, laughing, seemed to be in good spirits.

* * *

Not knowing at the time who John Pratt was and not having his name mentioned, a statement at a luncheon by Mr. McCoy and also backed up by Mr. Basham was that contractors had taken contracts, consequently, money away from Pro-Star, that they had violated their no compete clause and Pro-Star intended to make an example of them.

* * *

The only other statement that I remember being made was a statement that UDOT was a Pro-Star

> client and was going to remain a Pro-Star client, and therefore by going into Pro-Star [sic] on their own, John Pratt and Ron Hartle had opened themselves up to a lawsuit and would basically have to get out.
>
> (T. 116-117, 119-20, and 122-23.)

Crocker consistently placed McCoy's statements in the context of the covenant not to compete:

> Q. Okay, and you understood all along and throughout this thing what was motivating those statements was the fact that somebody at Pro-Star believed there had been a violation of some noncompetition clauses, right?
>
> A. Yes.
>
> Q. And throughout the time as you observed those individuals who were making these statements, Mr. McCoy specifically, it was clear that he sincerely believed that that was the case.
>
> A. That's my belief.
>
> (T. 125.)

3. Roger L. Clawson--Clawson gave the following testimony about a conversation he had with McCoy in February or March, 1989, six months before McCoy's September 28, 1989 contact with UDOT:

> [T]he subject of John Pratt came up and the gist of the conversation was that Will was unhappy with John Pratt's conduct of terminating his contract and going to work directly for a client. He felt -- his comments were the frame that it was unethical and he was quite unhappy with John.
>
> (T. 194 appended hereto as Addendum 10.)

4. Glen B. Read--Read gave the following testimony that might be viewed as bearing on McCoy's state of mind:

Q. (By Mr. Broadbent) Did you later have any other conversations with Will McCoy in which John Pratt was mentioned?

A. Yes, I did.

Q. When was the next conversation that you remember having with him?

A. I believe it was on May 3rd, 1989.

Q. And what did Mr. McCoy say on that occasion about John Pratt?

A. He was telling me that he believed that I should not have any dealings with Mr. Pratt because he believed that he was a bad influence on me.

Q. Did he say anything else?

A. He said that he had done several things that were professional unethical and that he--he said that he could not elaborate, but he said that he had done things that were far worse than anything I knew about.

Q. Did you know about anything unethical that Mr. Pratt had done?

A. The only thing that I had known about that could even be construed in my mind as touching upon a lack of ethics was his transition from being a Pro-Star employee to a subcontractor.

Q. There was something about that that you thought was inappropriate?

A. I thought that it was.

* * *

A. I believe that the client had some pressure put upon them to act according to John's wishes because he was in charge of the project and they couldn't afford to lose him. . . .

Q. And your understanding was that if he would have walked away back when he had the employment agreement and done what -- and as he threatened to do, that would have created a severe problem for Pro-Star in terms of staffing and making the

client happy in that particular situation; isn't that correct?

A. It's conceivable, yes.

Q. And so the unethical thing you thought perhaps was there was something a bit coercive in terms of his seeking a subcontract where he was such an essential part of the operation and things were sort of in the middle of getting done; is that correct?

A. Yes.

(T. 202-04 appended hereto as Addendum 11.)

5. Charles Christensen--Charles Christensen testified as follows regarding McCoy's statements after McCoy's second meeting with UDOT's Neal Christensen (these excerpts are appended to this brief as Addendum 12.):

> To the best of my recollection, it was stated that Mr. Pratt and another gentleman had broken their contracts, which is a no-competition contract with Pro-Star, and had sought contracts on their own behalf, and that Pro-Star couldn't afford to let that happen and that's the reason they signed a no-competition agreement with their employees, and that they really didn't want that to happen and be part of the business and they had to make some kind of a statement to the rest of the business world. . . .
>
> He just said that UDOT was in an uncomfortable position but were willing to work it out in a businesslike fashion.

(T. 274-75.)

Charles Christensen also remembered:

> . . . There was more discussion at a later time towards September on kind of like a case study on the whole thing, and our information was that Mr. Pratt had broken his agreement with Pro-Star. . . .

> Nothing was really said derogatory about Mr. Pratt the whole time. It's just business practice.
>
> (T. 276-77.)

6. Ronald J. Hartle--Hartle testified that, after April, 1989, he never spoke again with McCoy about Pratt. (T. 284; all Hartle testimony is appended hereto as Addendum 13.) Hartle also stated that, when his own breach of the covenant not to compete became known to Prodata: "I talked to Bill Basham who is the owner of Pro-Star/Prodata and at that time he indicated that he would take whatever means he could to get me out of UDOT." (T. 286.)

B. Pratt's Evidence of McCoy's State of Mind Was Not Sufficient to Prove Improper Purpose.

Pratt failed to offer sufficient evidence that McCoy acted with a predominant purpose to injure Pratt for the sake of injury alone. Each of Pratt's witnesses recognized that McCoy acted for business rather than personal reasons. For instance, Crocker placed all that he heard and observed in the context of McCoy's sincere (and correct) belief that Pratt had violated his covenant not to compete. Likewise, Clawson, Read and Charles Christensen acknowledged that McCoy's "unhappiness" with Pratt arose out of economic factors rather than out of some personal animosity. Nothing reported by these witness would support an inference that McCoy acted out of an overriding desire to hurt Pratt. This Court has observed:

> In the rough and tumble of the marketplace, competitors inevitably damage one another in the

> struggle for personal advantage. The law offers no remedy for those damages--even if intentional--because they are an inevitable byproduct of competition.
>
> 657 P. 2d at 307.

As Charles Christensen aptly observed regarding McCoy's conduct: "It's just business practice." (T. 277.)

With respect to discerning a person's state of mind, this Court in Leigh Furniture wisely cautioned:

> Problems inherent in proving motivation or purpose make it prudent for commercial conduct to be regulated for the most part by the improper means alternative, which typically requires only a showing of particular conduct.
>
> 657 P. 2d at 307 (footnote omitted).

Thus, in Leigh Furniture, this Court rejected "improper purpose" as the basis for sustaining a jury verdict despite evidence of four years of repeated and blatant acts of harassment. Cf., Sampson v. Richins, 770 P. 2d 998, 1003-04 (Utah App. 1989) (court declined to address issue of "improper purpose" citing the cautionary language of Leigh Furniture). The wisdom of this caution is manifest in the jury's handling of the evidence in this action. The single September 28, 1989 meeting, benign to all appearances, has become the basis for a judgment that Prodata acted with a predominant intent to hurt Pratt.

The broader evidentiary concerns in intentional interference cases were discussed by the Iowa Supreme Court in Harsha v. State Savings Bank, 346 N.W. 2d 791 (Iowa 1984):

> Circumstantial and direct evidence are equally probative, State v. O'Connell, 275 N.W. 2d 197, 205

> (Iowa 1979), but the substantial evidence rule requires that the circumstances have "sufficient probative force to constitute the basis for a legal inference, and not for mere speculation. . . ." 32A C.J.S. Evidence § 1039, pp. 753-54 (1964); see also 30 Am. Jur. 2d Evidence § 1091, at 251 (1967) ("Circumstantial evidence must do more than raise a suspicion; it must amount to proof. It is necessary that there be some reasonable connection between the facts proved and the fact at issue."). Circumstances are not sufficient when the conclusion in question is based on surmise, speculation, or conjecture.
>
> 346 N.W. 2d at 800.

Applying the Leigh Furniture articulation of the law of intentional interference with economic relations, the Harsha court reversed a jury verdict awarding the plaintiffs damages for intentional interference with economic relations. The court could find no evidence of impropriety in the facts presented to the jury.

The jury's finding in this action rises to nothing more than a "surmise." There exists no "reasonable connection" between McCoy's behavior as observed by the witnesses and the conclusion that he acted first and foremost to hurt Pratt as an end in itself. The verdict exemplifies the "[p]roblems inherent in proving motivation or purpose" and should be set aside. 657 P. 2d at 307.

The two principal cases cited in Leigh Furniture underscore the insufficiency of the evidence in the record before this Court to support a finding of improper purpose. Top Service Body Shop, Inc. v. Allstate Insurance Co., 283 Ore. 201, 582 P. 2d 1365 (1978) was the source of this Court's analysis in

Leigh Furniture. In Top Service, the plaintiff presented evidence to the jury of (a) a preexisting dispute between the plaintiff and the defendants, (b) the defendant "actively discourag[ing]" its insureds from patronizing the plaintiff, (c) specific remarks by the defendant "disparaging" the plaintiff's services and (d) steps taken by the defendant to prevent its insureds who wished to do so from using the plaintiff's services. 582 P.2d at 1372. Although there was no direct evidence of a motive to hurt, the jury found this circumstantial evidence sufficient to infer an "improper purpose."

Thereafter, the trial court granted the defendant's motion for judgment n.o.v. ruling that, despite the evidence cited above, the record could not support an inference of "improper purpose." On appeal, the Oregon Supreme Court affirmed the trial court's ruling:

> [W]e agree with the trial court that these acts were wholly consistent with [the defendant's] pursuit of its own business purposes as it saw them and did not suffice to support an inference of the alleged improper purpose to injury [the plaintiff].
>
> 582 P.2d at 1372.

The court held that the record contained no direct evidence of intent to hurt the plaintiff and that evidence of the defendant's conduct would "not support an inference that [the defendant] had any design or purpose to inflict injury on [the plaintiff] as such. . . ." 582 P.2d at 1372. Similarly, all the evidence at trial showed was Prodata and McCoy pursuing

business purposes, i.e., enforcement of the covenant not to compete and the maintenance of good relations with UDOT.

The second case, Alyeska Pipeline Service Co. v. Aurora Air Service, Inc., 604 P.2d 1090 (Alaska 1979), was singled out by this Court in Leigh Furniture as setting forth facts supporting a finding of improper purpose; yet, it affords Pratt no comfort. In Alyeska, the plaintiff initially brought suit against the defendant to resolve a payment dispute. After paying the amount in dispute, the defendant exercised its separate and unrelated contractual right to replace the plaintiff as air carrier for a third party. The plaintiff was then terminated by the third party and proceeded to bring an action for intentional interference with contract alleging improper purpose, i.e., retribution for the plaintiffs' prior legal action.

The Alyeska court stated:

> In the case at bar, the central factual issue, as to which there was evidentiary conflict, was whether [the defendant] was genuinely furthering its own economic and safety interests or was using them as a facade for inflicting injury upon [the plaintiff].

604 P.2d at 1094 (emphasis added).

The Alyeska court found the evidence sufficient to support a finding that the defendant had exercised its third-party contractual right to settle scores on the entirely unrelated payment dispute. In contrast, Pratt's breach of his covenant not to compete was at the center of both Prodata's problems with Pratt and the act of interference--the contact with UDOT. In

all the evidence offered by Pratt, there is not the slightest suggestion that Prodata used the covenant not to compete as a "facade for inflicting injury. . . ." To the contrary, the covenant not to compete was a vital part of Prodata's relationship with its employees and clients. McCoy's actions were nothing more than a consistent effort to protect Prodata's goodwill and business interests.

More recently, in United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 551 N.E.2d 20 (1990), the Massachusetts Supreme Judicial Court adopted this Court's reasoning in Leigh Furniture. In United Truck, the plaintiff alleged that, because the plaintiff had failed to give the defendant leads for new business, the defendant had interfered with both existing and prospective contractsof the plaintiff. Affirming a directed verdict for the defendant, the court held that the defendant's "apparent motives were to benefit his customers and himself financially. There is not enough evidence to warrant a finding that his real motive in these matters was to hurt [the plaintiff]." 551 N.E.2d at 24.

Viewed in the light most favorable to Pratt, the record in this action does not support an inference that McCoy acted with a predominant purpose to hurt Pratt. First, none of the evidence indicates that McCoy entertained any ill will towards Pratt. It is a major leap from "unhappiness" to malice. Pratt's breach of the covenant not to compete was the sole source of any disagreement and unhappiness. McCoy felt that

Pratt had acted unethically specifically because Pratt "had gone to work directly for a client" and had disregarded his covenant not to compete. (T. 194.) Such displeasure was clearly motivated by McCoy's and Prodata's economic interests. Each of Pratt's witnesses recognized that business considerations, rather than personal animus, underlay McCoy's words and actions. The requisite motive must be to inflict injury as "an end in itself." 657 P.2d at 308. There was no showing that this was ever McCoy's motive.

Second, even assuming the evidence at trial would support an inference that McCoy acted in some measure to inflict injury for the sake of injury, the evidence is not sufficient to show that such a motive "predominated." McCoy's chief motive, even in the eyes of Prodata's former employees, was to further Prodata's economic interests by enforcing the covenant not to compete. In this, he was like the defendant in United Truck--primarily seeking to benefit Prodata financially. Further, this is not a case like Alyeska where exercise of a contractual right was "a facade for inflicting injury. . . ." 604 P.2d at 1094. The Alyeska defendant had a grudge arising from one transaction and, based on that grudge, took arbitrary action in a separate transaction that had only superficial economic justification. There is nothing in the record to suggest that McCoy's contact with UDOT regarding Pratt as part of his response to Pratt's breach was nothing more than "a facade for inflicting injury upon" Pratt. In sum, it must be concluded that the finding of

"improper purpose" was based only on "surmise, speculation, or conjecture." 346 N.W.2d at 800.

III. THE EVIDENCE AT TRIAL WAS NOT SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT THE ACTIONS OF PRODATA AND McCOY WERE THE APPROXIMATE CAUSE OF PRATT'S INJURY.

This Court has stated with respect to proximate cause:

> Proximate cause is a legal construct calling for a legal conclusion based on various factors in addition to an actual cause-effect relationship. It is common place in the law that an act, omission, or force may be an actual cause, but not a proximate cause.
>
> Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078, 1083 (Utah 1985).

The defendants do not dispute the factual finding that there existed a cause-effect or "but for" causal relationship between their words and Pratt's discharge. However, proximate cause is more than cause and effect. The legal analysis of proximate cause is driven by "considerations of common sense and public policy." McKellips v. Saint Francis Hospital, Inc., 741 P.2d 467, 470 (Okl. 1987).

A. The Evidence

The evidence showed the following regarding the proximate cause of Pratt's injury:

1. At trial, Pratt sought and obtained recovery for damages from October 2, 1989 through the conclusion of certain work at UDOT. (R. 2-13.)

2. UDOT's discharge of Pratt and Hartle was not absolute. Pratt could return to work once he had settled his differences with Prodata. Pratt testified:

Q. And when you were advised you were terminated, it wasn't, "Mr. Pratt, you're out of here and never come back," it was, "Mr. Pratt, you're out of here, but if you can resolve things with Prodata, you're welcome to come back."

A. Yes.

Q. Those were the terms. It wasn't just cutting you loose; isn't that correct?

A. That's correct.

(T. 88.)

3. Hartle settled his differences with Prodata and returned to work at UDOT. (T. 290-92.)

4. Pratt knew that he had violated the covenant not to compete, but he believed erroneously that the covenant was unenforceable.

On this point, Pratt testified:

Q. And so assuming that the jury or the law doesn't agree with your perception that these contracts superseded each other, you would have had an existing obligation not to compete through the end of April of 1989; isn't that true?

A. That's right.

Q. And when you went to work for UDOT, you at least recognized the potential that those two months might fall under the noncompetition provision that was included in your employment agreement, didn't you?

A. I didn't consider that to be a factor at all.

Q. You hadn't discussed that?

A. That agreement had been superseded.

(T. 58.)

5. Based on this erroneous belief, Pratt rejected all offers by Prodata to settle their differences and, as of

October 5, 1989, took the position that he would not pay a penny to resolve the issue of his violation of the covenant not to compete.

Pratt's testimony on this point was as follows:

Q. And did you direct your attorney to speak with me?

A. Yes, I did.

Q. And did your attorney advise you of anything that had been said in conversations between him and me?

A. Nothing other than your initial position that I needed to pay money in order to get back to UDOT.

Q. So you were told that a dollar offer of settlement had been made on behalf of Pro-Star, right?

A. Yes.

Q. And you were fundamentally opposed to paying a penny?

A. Absolutely, absolutely.

Q. And you'd rather be in this litigation than pay a penny; is that right?

A. I would rather have had Pro-Star act responsibly and let me get on equal economic footing before we discussed any problem they had with me. I would rather they had come to me directly, yes.

Q. But the fact is, you would rather be in litigation than pay a penny to Pro-Star.

A. I would not pay money to someone who had caused me damage in order to extort that money from me, in my words.

Q. That's not the question.

A. Rather than do that, yes, I would rather be here.

* * *

Q. But when the topic came up, they told you how the problem could be solved, didn't they?

A. Yes.

Q. And that was to pay around $4,000, right?

A. Yes, they did.

Q. And you never made a counter offer so nobody even negotiated the matter, did they?

A. No, we did not negotiate the matter, no.

* * *

Q. And in fact, after that moment in time, you never had any more discussions and to your knowledge, the attorneys had no more discussions about the possibility of resolving this matter short of litigation; is that right?

A. That's correct.

Q. And you recognized at that time that the consequence of not resolving the matter was you would not get back the work at UDOT unless you could persuade Mr. Christensen to the contrary.

A. That's right.

Q. Okay, and you knew that not going back to work at UDOT might result in your being deprived, in your own testimony, deprived of contracts exceeding $84,000; isn't that correct?

A. I had no knowledge of any figures at that time.

Q. But you recognize that there was some --

A. I recognized that there was some dollars involved.

Q. Tens of thousands of dollars?

A. Yes.

Q. And you also knew, did you not, that Mr. Hartle, in fact, did make a settlement with Pro-Star and he went back and worked at UDOT; is that correct?

A. That's correct.

(T. 64-68; all Pratt testimony cited is appended hereto as Addendum 14.)

6. Only after Pratt made the conscious decision to abandon any effort to settle with Prodata and UDOT's conditional discharge become final did Pratt suffer the damages awarded at trial.

B. The Evidence Was Not Legally Sufficient on The Issue of Proximate Cause.

The issue presented is actually more legal in nature than factual. This Court must determine whether common sense and public policy support the jury's finding that the acts of the defendants were the proximate cause of Pratt's losses. Well before Pratt had suffered any appreciable injury, Prodata made a reasonable offer of settlement ($4,000 v. $25,000 liquidated damages). Pratt not only declined the offer but refused to counter the offer. This refusal was based on the misinformed notion that he was not bound by the covenant not to compete. In contrast, Hartle reached a compromise with Prodata and returned to work.

This Court has long articulated a policy in favor of settlement and compromise. See, e.g., Alvin G. Rhoades Pump Sales v. Industrial Commission of Utah, 681 P.2d 1244, 1248 (Utah 1984). Prodata made a good faith attempt to reach a compromise with Pratt. Hartle's experience shows that Prodata was in earnest. Pratt's own misevaluation of his legal position led him to terminate all meaningful discussion of settlement and

instead to seek redress in this legal action. Such a course offends both common sense and public policy. Pratt caused his own losses. To lay blame for Pratt's losses, as a matter of law, on Prodata and McCoy when Pratt made the conscious decision not to compromise rewards intransigence and promotes litigation as a means of dispute resolution over negotiation and settlement. Pratt was the sole legal cause of his losses and should bear responsibility for those losses.

IV. THE EVIDENCE AT TRIAL WAS NOT SUFFICIENT TO SUPPORT A JURY FINDING THAT PRODATA AND McCOY FAILED TO ACT IN GOOD FAITH, AND, THEREFORE, WITHOUT PRIVILEGE.

The trial court correctly instructed the jury that Prodata and McCoy were entitled "to assert and protect their economic and legal rights" provided they "proceed in good faith." The sole measure of that good faith was whether Prodata and McCoy "entertained an honest belief" that Pratt had breached the covenant not to compete. (R. 733 [Jury Instruction No. 25] appended hereto as Addendum 7.)

The evidence set forth at pages 16 through 21 above with respect to improper purpose also constitutes the evidence that bears on the issue of privilege. Also of consequence in evaluating the jury's verdict is the trial court's finding by directed verdict that the covenant not to compete was valid and enforceable. (Addendum 4 and 8.) With this finding, not disputed on appeal, the issue of privilege turns on whether the evidence was sufficient to show that Prodata and McCoy failed to act in good faith.

This Court has equated "good faith" with "honesty." See Sugarhouse Finance Co. v. Zions First National Bank, 21 Utah 2d 68, 440 P. 2d 869, 870 (Utah 1968). Utah Code Ann. § 70A-1-201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned." Whatever the definition, the evidence at trial allowed for only one conclusion: McCoy was honest in stating to UDOT that Pratt had violated the covenant not to compete and that UDOT's handling of Pratt's contract violated procurement practices. Prodata was doing nothing more than asserting its rights under the covenant not to compete and under the law generally.

Prodata and McCoy were privileged defendants. Pratt had breached his covenant not to compete and Prodata wanted to advise UDOT as a party to that breach. The very law of intentional interference with economic relations on which Pratt relies makes potentially actionable UDOT's participation in Pratt's breach. See, e.g., Agrimerica, Inc. v. Mathes, 199 Ill. App. 3d 435, 557 N.E. 2d 357, 367 (Ill. App. 1990). Certainly, Findlay was concerned about UDOT's possible liability for its dealings with Pratt and Hartle. (T. 98.) Public policy favors permitting free commercial discourse that encourages early identification and resolution of disputes. The result in this action would require a party clearly wronged by a former employee and arguably wronged by a third party to remain silent regarding the wrong or risk legal action. The law imposes no such requirement.

V. THE EVIDENCE AT TRIAL DICTATED A FINDING THAT PRATT INTENTIONALLY OR HEEDLESSLY FAILED TO PROTECT HIS OWN INTERESTS.

Restatement (Second) of Torts § 918(a) (1979) provides:

> One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

(Emphasis added.)

Comment to Section 918 at page 502 provides the following example that bears striking resemblance to the undisputed facts of this case:

> A destroys a fence on B's land, intending for B's cattle to escape. B sees what is happening but in the belief that A would be responsible for all harm caused by the destruction of the fence, intentionally fails to prevent his cattle from escaping as he easily could do. B is not entitled to recover damages for harm caused to his cattle by their escape.

Pratt's own testimony set forth at pages 28 through 31 above establishes the applicability of this legal principle. Pratt, like B in the above example, saw what he perceived as a wrong to be unfolding, knew how to avoid the harm caused by that wrong, but wrongly believing that the covenant not to compete was unenforceable, he refused to pursue the compromise that would prevent the harm. The evidence at trial requires that Pratt be responsible for the loss he caused by refusing to resolve his differences with Prodata. The jury's finding that

Pratt did not fail intentionally or heedlessly to protect his own interests cannot be supported by sufficient evidence.

IV. PRATT FAILED TO OFFER ANY EVIDENCE THAT PRODATA DID NOT SUFFER DAMAGES AS THE RESULT OF HIS BREACH OF THE COVENANT NOT TO COMPETE.

Certain basic propositions relating to the enforcement of Pratt's covenant not to compete are now established by the trial court's directed verdict, the jury's Special Verdict and the undisputed law and evidence:

a. The covenant not to compete was enforceable and was not superseded by a later covenant. (Addendum 4 and 8.)

b. Prodata did not waive enforcement of the covenant not to compete nor did Prodata act so as to subject itself to the defense of laches. (Addendum 5.)

c. Pratt worked for UDOT as a competitor of Prodata two months before the covenant not to compete expired. He worked 227 hours over that two month time period and received $10,215 in compensation. (T. 59-61.)

Pratt had the burden at trial of proving that Prodata suffered no damage as the result of his undisputed breach of the covenant not to compete. In Young Electric Sign Co. v. United Standard West, Inc., 755 P.2d 162, 164 (Utah 1988), this Court stated:

> The burden is on the party who would avoid a liquidated damages provision to prove that no damages were suffered or that there is no reasonable relationship between compensatory and liquidated damages.

Pratt failed to meet either of these burdens. Pratt did not offer any evidence at trial that would support an inference that Prodata suffered no injury as the result of his breach of the covenant not to compete. At most, Pratt contended that Prodata's out of pocket loss arising from his failure to account for the gain he received from the breach was only $2,646.70 as opposed to $4,199.50. (T. 61, 83.)

Covenants not to compete have as their purpose to protect the employer's goodwill in an employee who renders special, unique, or extraordinary services. See System Concepts Inc. v. Dixon, 669 P.2d 421, 426 (Utah 1983). There was no dispute at trial that Pratt's covenant not to compete fit this description and that Pratt was such an employee. (Addendum 8.)

Customarily, the covenant would be enforced by injunctive relief. See System Concepts, supra, 669 P.2d at 427-28. Such enforcement requires a showing of "irreparable harm." The court in System Concepts noted:

> [T]he nature of the threatened harm is irreparable, inasmuch as the damages that may result from the misappropriation of confidential information and goodwill "could be estimated only by conjecture and not by any accurate standard."

669 P.2d 428
(footnote omitted and emphasis added).

In recognition of the "conjectural" nature of any estimate of losses from a breach, Pratt's Employment Agreement established as the enforcement mechanism for the covenant not to compete--rather than injunctive relief--an award of liquidated damages in an agreed amount of $25,000. Yet the interest to be protected was the same as in System Concepts--goodwill--and subject to the same difficulties of proof identified by this Court in System Concepts.

Damages to goodwill are problematic because they are injuries to an intangible and inevitably require some level of "conjecture" to quantify or even to identify. However, this is not to say that such damages are not real. This Court has stated with respect to goodwill:

> If there is legal consideration given to support it, an employer is equally entitled to the goodwill created by his employee, as is the purchaser of an establishment which includes the goodwill of the business. In both cases, when the individual responsible for creating the goodwill and the business to which it attaches, become separated, it is necessary to preserve that goodwill to the business by a covenant on the part of the individual that it will not compete in an area where his personal reputation will detach the old customers from the old business.
>
> Allen v. Rose Park Pharmacy
> 237 P.2d 823, 827 (Utah 1951)

It is clear that, in this action as in System Concepts, a valued employee, who had generated substantial goodwill for his employer at a customer, undertook to use that goodwill developed while in the service of the employer in competition with, and therefore to the detriment of, the

employer. (T. 51, 52, 322.) Pratt offered no evidence to meet his burden to prove that the breach of his covenant not to compete caused Prodata no damage to its goodwill. In Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210 (Utah App. 1989), the Utah Court of Appeals upheld a liquidated damages clause as the enforcement mechanism for a covenant not to compete. After leaving the plaintiff's employ, the defendant had done business with three principals of the plaintiff in violation of his covenant not to compete. Considering the plaintiff's defense that the contract's liquidated damages clause was unenforceable, the appellate court examined the evidence and concluded:

> Even if the instruction could be read to put the burden on [the defendant] to show no damages were suffered or there was no reasonable relationship between the actual damages [the plaintiff] suffered and the $42,176.09 it would collect under the agreement, there was insufficient evidence introduced below to enable the jury to find either proposition.
>
> 784 P.2d at 1214
> (emphasis added).

Likewise, in the present action, the plaintiff failed to offer any evidence that Prodata suffered no damage or, for that matter, that there was no reasonable relationship between the contemplated damages and the liquidated damages. (Special Verdict Question 11.) In view of this failure of proof, Pratt's defense to the Counterclaim must fail and Prodata is entitled to recover liquidated damages in the amount of $25,000 as a matter of law.

CONCLUSION

This Court should vacate the judgment in favor of Pratt on the First Claim for Relief and the Counterclaim and should enter Judgment in favor of the defendants. In the alternative, the Court should order a new trial of all issues not definitively resolved by the jury.

DATED this 26th day of August, 1991.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By _____

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing BRIEF OF APPELLANTS to be mailed, postage prepaid this 26th day of August, 1991, to the following:

Berne S. Broadbent, Esq.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

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Tab 1

NON-DISCLOSURE/NON-COMPETITIVE
EMPLOYMENT AGREEMENT

In exchange for my becoming employed (or my employment being continued) by PRODATA or its subsidiaries, affiliates or successors (hereafter referred to collectively as "PRODATA"), I hereby agree a follows:

1. I will perform for PRODATA such duties as may be designated by PRODATA from time to time. I will devote my best efforts to the interests of PRODATA and will not engage in any activities detrimental to the best interests of PRODATA or accept other employment, consulting assignments or memberships on the Board of Directors or as an officer of other companies which would involve any activities directly competitive with my employers or which would unduly interfere with my work performance during normal business hours without the prior written consent of PRODATA during my period of employment by PRODATA.

2. Without further compensation, except as outlined in hiring or company software incentive agreements, I hereby agree promptly to disclose to PRODATA, and I hereby assign and agree to assign to PRODATA, or its designee, my entire right, title, and interest in and to all designs, trademarks, discoveries, formulae, processes, manufacturing or marketing techniques, trade secrets, proprietary information, inventions, improvements, ideas, lists or copyrightable works, including all rights to obtain, register, perfect and enforce these proprietary interests (a) which pertain to any line of business activity of PRODATA, including without limitation the development or manufacture of computer terminals and related computer programs and applications, (b) which are aided by the use of time, material or facilities of PRODATA, whether or not during working hours, or (c) which relate to any of my work during the period of my employment with PRODATA whether or not during normal working hours.

3. I agree to perform, during and after my employment, all reasonable acts deemed necessary or desirable by PRODATA to permit and assist it, at its expense, including execution of documents and assistance or cooperation in legal proceedings, in obtaining and enforcing the full benefits, enjoyment, rights and title throughout the world in the items hereby assigned by PRODATA as set forth in paragraph 2 above.

4. I agree to hold in confidence and not directly or indirectly to use or dislcose, either during or after termination of my employment with PRODATA, for a period of one (1) year, any information I obtain during the period of my employment, whether or not during working hours, pertaining to any aspects of the business of PRODATA which either is information not known by actual or potential competitors of PRODATA or is proprietary information of PRODATA or its customers or suppliers, whether of a technical nature or otherwise, except to the extent authorized by PRODATA, until such information becomes generally known through no fault of my own. I agree not to make copies of such information except as authorized by PRODATA. Upon termination of my employment or upon an earlier request of PRODATA, I will return or deliver to PRODATA all tangible forms of such information in my possession or control, including but not limited to drawings, specifications, documents, records, devices, models or any other material and copies or reproductions thereof.

5. This Agreement (a) shall survive my employment by PRODATA, for a period of one (1) year, (b) does not in any way restrict my right or the right of PRODATA to terminate my employment, (c) inures to the benefit of successors and assigns of PRODATA, and (d) is binding upon my heirs and legal representatives.

6. This Agreement does not apply to an invention to which its application may be prohibited by law. I agree to disclose all inventions made by me during the course of my employment with PRODATA, in confidence to PRODATA to permit a determination as to whether or not the inventions should be the property of PRODATA as outlined in the Employees Software Incentive Agreement.

7. I certify that, to the best of my information and belief, I am not a party to any other agreement or under any legal or equitable obligation to a previous employer which will interfere with my full compliance with this Agreement. I represent that I will not use or disclose to PRODATA any proprietary information of any former employer in performing services for PRODATA.

8. I understand that I must maintain confidentiality of all software codes, models, programs and documentation as confidential and privileged trade secrets owned exclusively by PRODATA. I certify that I will not at any time in the future use or disclose any proprietary information or trade secrets of PRODATA concerning PRODATA software products. I understand that this term is not subject to only one year after termination but goes on in perpetuity. I also understand that this term cannot be violated and then remedied by the $25,000 liquidated damages as stated for the consulting work in term #9.

9. I agree that I will not for a period of one (1) year after termination of my employment for any reason whatsoever, whether directly or indirectly, engage in or accept employment from or become affiliated with or connected with any business which is directly competitive with PRODATA within an area of fifty (50) miles from the city limits of Salt Lake City, Salt Lake County, Utah, either as an individual, proprietor, partner, employee, co-venturer, agent, officer, director or stockholder. I further agree that during that time period not to, directly or indirectly, approach, contact, solicit, or call upon any persons, parties, or businesses who at the date of termination and for a period of one (1) year prior to said termination were clients of PRODATA or in any way attempt to divert said clients business from PRODATA to any other person, party or business. As used in this paragraph, the phrase "any business which is directly competitive" should be construed to mean any private, profit oriented business of the same or similar nature within the geographical area which is currently soliciting business and prospective clients that would be similar or identical in scope to the clients of PRODATA. The phrase does not include government agencies nor other employment by an entity in the area which although similar in scope, does not solicit or attempt to solicit clients of similar scope and nature as the clients of PRODATA.

   If, however, I do violate the terms of this Agreement, I agree to pay to employer Twenty Five Thousand Dollars ($25,000), as liquidated damages for so doing, that sum being agreed to as the amount of damages which shall be done to the business of PRODATA by said act or acts. Such liquidated damages shall be the sole and exclusive remedy for breach of this Non-Disclosure/Non-Competitive Agreement.

10. I certify and acknowledge that I have carefully read all of the provisions of this Agreement and that I understand and will fully and faithfully comply with such provisions.

Amendment attached

PRODATA INC.

By: Bill Barham
Title: President
9-23-85

EMPLOYEE

By: John P. Pratt
Date: 9-23-85

1000333

Amendment to the Pro-Star Non-Disclosure/Non-Competitive Agreement
of John P. Pratt

September 16, 1985

The prohibitions against working for or starting a business to compet with Pro-Star [redacted] shall not apply in the event that termination of employment is due to:

(1) Failure of Pro-Star to provide work in the Salt Lake Metropolitan Area,

or

(2) Failure of Pro-Star to make payment within 7 days of scheduled payday,

or

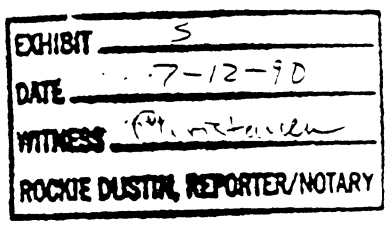
(3) Substantial misrepresentation of pay, benefits, or working conditions on the part of Pro-Star.

Tab 2

September 28, 1989

E.H. Findlay, C.P.A.
Executive Director

Harold W. Worrall, P.E.
Comptroller



Data Processing Contracts

Several Data Processing contracts for consultant services have been reviewed. The following is a summary of that review:

1. Contracts were executed between UDOT and Aspen Consulting and Computer Solutions. Aspen Consulting's contract was for the period 4/27/89 through 6/30/89 and was valued (according to the contract document) at $250,000 total with a limit of $50,000 per project. Computer Solutions' contract was for the period 4/27/89 through 6/30/89 and was valued (according to the contract document) at $25,000 with a limit of $20,000 per project. Aspen consulting is owned and operated by Ron Hartle. Computer Solutions is owned and operated by John Pratt. The contract documents did not specify the type of service to be delivered under either contract.

2. An existing contract between UDOT and Pro Star was amended upward for an additional $72,000 and extended from 1/1/89 through 9/1/89. This contract was for ISS DP Chargeback work (according to back-up contract documentation).

3. Pro Star employed both Ron Hartle and John Pratt. John Pratt terminated his employment with Pro Star at the end of March 1989. Ron Hartle terminated his employment with Pro Star in July 1989. Ron Hartle was awarded the contract described previously while he was an employee of Pro Star.

4. Pro Star invoiced UDOT for services delivered by Ron Hartle on 7/7/89 for 225.5 hours @ $45 per hour. The invoice specified that the services were delivered during the period 5/1/89 - 5/31/89. The total of the invoice was for $10,147.50. Pro Star also invoiced UDOT for services delivered by Ron Hartle on 7/13/89 for 204 hours @ $45 per hour. The invoice specified that the services were delivered during the period 6/1/89 - 6/30/89. The total of the invoice was for $9,180.

5. Aspen Consulting (Ron Hartle) invoiced UDOT on 7/25/89 for 66 hours @ $45 per hour for "Services rendered on the System Analysis and Initial Design for the ISS Data Processing Chargeback system". The invoice did not specify the period involved, however, it was dated 6/12/89. The total of the invoice was $2,970. Aspen Consulting also invoiced UDOT on 7/25/89 for 12 hours @ $45 per hour for "Services rendered on

the period involved, however, the invoice was dated 7/19/89. The total of the invoice was $540. Although the billing periods were not specified, it is assumed that they cover the months of May and June 1989 respectively. The award of the contract, subsequent billing documentation, and the relationship of Ron Hartle to Pro Star has placed UDOT in the position of contracting with an employee of a consultant to deliver the same general service as the consultant. This may have put UDOT in a position of liability to Pro Star.

6. Computer Solutions (John Pratt) invoiced UDOT on 6/1/89 for "Data Processing Consulting - John Pratt MMS Feasibility Study" for 227 hours @ $45 per hour for the period 2/27/89 through 4/30/89. This totaled $10,215. The same warrant paid another invoice for "Data Processing Consulting - John Pratt MMS Feasibility Study & EMS Feasibility" for 170 hours @ $45 per hour for the period 5/1/89 through 5/31/89. This totaled $7,650. John Pratt was employed with Pro Star for a partial period during the time encompassed by the invoice dated 6/1/89. In addition, no contract was in place to pay Computer Solutions or John Pratt for services rendered prior to 4/27/89. Computer Solutions/John Pratt was a bidding vendor for a contract awarded through a competitive procurement process by UDOT. He was selected to render services under an open ended contract as the need arose in UDOT Data processing. This selection, subsequent contract, and documented billings when viewed together invalidates the competitive procurement and violated procurement practices in the State of Utah.

7. The payments in the previous occurrences were paid and recorded in FY89. Both contracts to Aspen Consulting and Computer Solutions expired 6/30/89. Computer Solutions has billed and received payments since 6/30/89 of $7,155 and $5,400. No contract amendment is on file. Aspen Consulting has billed and received one payment since 6/30/89 of $7,942.50.

8. The contract with Computer Solutions appears to be overrun by $12,755 (with a strict interpretation of contract documentation present and wording).

Attached are copies of all invoices, contracts, and supporting documentation used in the preparation of this analysis.

Tab 3

DP CONTRACT ISSUE

DATE: ISSUE PERIOD BEGAN: SEPT. 27, 1989

ISSUE INVOLVES: PRO-STAR, ASPEN, AND COMPUTER SOLUTIONS CONSULTING COMPANIES.

INDIVIDUALS: WILL MCCOY- PRO STAR
RON HARDLE- ASPEN
JOHN PRATT- COMPUTER SOLUTIONS

THE FOLLOWING IS A CONTINUING SUMMARY OF INVOLVEMENT OF MYSELF AND THE DEPARTMENT (SENIOR MANAGEMENT) IN THIS ISSUE.

EVENTS-FINDINGS:

Wed
September 27, 1989:

I met Harold Worrall and Will Mc Coy in Atrium. Harold asked that we meet on Sept. 28, AM to discuss a DP problem which Will M. had identified for him. I agreed to meet.

Thurs
September 28, 1989:

I met with Will M. at 8:30 AM on thursday morning. Harold was to be with us. He was late in coming.
Will M. explained his company has employee/sub contractor problems with two individuals (John Pratt and Ron Hardle). Because of contracts the Department has in place with both of these parties. We are professionally and perhaps legally at risk. It appears we may have hired them prior to the termination of employee or sub contractor agreements which Pro Star believes they legally have in place with both parties. These agreements have non-compete clauses. It appears that Ron Hardle (Aspen Consulting) and John Pratt (Computer Solutions) were hired and payed for time periods by the Department which could be in violation with the employee/sub contrator agreements.
These are allegations raised by Will M. which must be evaluated and considered by the Department.
Will M. emphasized that it was not the intent of Pro Star to legally or formally involve the Department in this issue

aware that Pro Star has non-compete provisions in their employee/sub contractor agreements.)

Harold W. joined us and we continued the discussion. Following the time with Will M., Harold agreed to have his staff review appropriate contracts and payment invoices to prepare us for another meeting to review where the Department appears to be in this matter, prior to meeting with the Director as soon as possible.

September 29, 1989:

Harold W. provided me a memo prepared by Gary Williams which provided a history of contracts and invoices related to this matter. He stated that, in his opinion, Gary's findings should be discussed with the Director as soon as possible. I agreed but asked for some time to review Gary's work with DP Staff to be sure of the facts and issues in Gary's memo.

DP Staff Meeting:

I met with Kent Nielsen, Loren Sheffield, and Garn Tollestrup at about 10:00 AM to discuss this matter. I focused on reconciling contracts and invoices to contracts. (Information provided by Harold W. indicated that the relationship termination date with Pro Star for John Pratt was March 1989 and this same date for Ron Hardle was July 1989).

The paid invoice copies provided by Gary W. indicated that the Department had:

1. Paid John Pratt for time worked beginning 27 February 1989.
2. Paid John Pratt for time worked after June 30, 1989 under a contract with Computer Solutions which expired June 30, 1989.
3. Paid Ron Hardle for time worked which was for a time period prior to July 1989.
4. Had paid Ron Hardle for time worked after June 30, 1989 under a contract with Aspen Corp. which expired June 30, 1989.
5. Extended a contract with Pro Star to September 1989. (Funding available under this contract may not be adequate to cover projected work and costs for the FY 1990 year.)

Following the invoices and contracts review I focused on who and how the contracts with John Pratt and Ron Hardle were initiated and prepared. From that discussion I learned the following:

- Loren Shefield and Garn Tollestrup were the principal individuals involved in the negotiation and preparation of the contracts. They acknowledged that that they had discussed Ron Hardle's relationship with Pro Star with him at the time they were discussing his contracting with the Department as Aspen. Garn stated he understood from that conversation that Ron H. had ended all relationships with Pro Star at that time. Loren's understanding was that Ron H. was continuing a sub contractor relationship with Pro Star on the pavement management system until the existing phase and funds were completed and used. He (Ron) then intended to end all relationships with Pro Star.

  I asked the question why they had not raised the the existing relationship with Kent N. or management prior to proceeding with the contract. Their response was that they felt that it was between Pro Star and Ron H. and further that non-compete clauses in employee agreements wouldn't hold up anyway.

  Kent N. acknowledged that he also was aware of the Ron H. relationship with Pro Star, but felt that it was an an issue between those two parties and that we should stay out of it.

September 29, 1989: Executive Director Meeting

Harold W., Gary W. and I met with Mr. Findlay to present Gary's findings and the issues associated with this matter. After a complete discussion of all that had happened and was involved, the following decisions were made:

- The Department should take immediate action to correct, clarify and adjust its relationship with the parties as rapidly as possible to maintain a legal, professional and fair position.

- Based on a legal review by the Attorney General's Office action was to be intiated to

John P. Computer Solutions) as soon as possible.

- o Contract modifications and extensions be put in place immediately to correct payments made without valid contracts.

- o Adjustments be put in place immediately to correct problem of payments getting through without valid contracts in place.

- o The contract format associated with this issue be re-evaluated to determine if adjustments are needed.

- o In private session with Mr. Findlay, staff performance in this matter was discussed. It was determined that this matter would be considered further.

The action proposed is not intended to be punitive to any of the contractors. It is intended to take immediate senior management action to adjust and right the situation as soon as senior management became aware of it. Our position is that when the parties have sorted out the issues appropriately, we can again consider doing business with Aspen and Computer Solutions.

Fri
September 29, 1989 PM:

I met with Mr. Lee Ford- staff attorney with the Attorney General's Office. I presented a brief history of the situation between the parties and the Department's involvement. I then presented the Department's proposed strategy to adjust our relationship with the parties and correct alleged problems.

Based on that information and a review of the language of the contracts involved, Lee F. advised me to proceed as proposed. He indicated that we may have one problem with the 15 day termination notice provision in the contracts. However he suggested that if either of the two parties raised concern with being terminated without the 15 day notice we just respond by

The reason to be used for the termination is to be 'the Department must take action to reduce (minimize) its relationship risk in this matter and assure that it attempts to reach and maintain a legal and professional relationship with all the parties involved, if possible.

September 29, 1989

I met with Will McCoy of Pro Star to gain more information concerning the identified termination dates for John Pratt and Ron Hardle.

The information provided by Will M. is as follows:

- o The legal termination dates recognized by Pro Star are:
  - John Pratt: March 29, 1989 (Sub Cont.)
  - Ron Hardle: September 7, 1989 (Verbal)
    September 22, 1989 (Letter)

- o Terms of non-compete agreements:
  - Employees will not compete with Pro Star for one year after terminating with Pro Star.
  - Sub Contractors will not compete with Pro Star for six months after terminating this relationship with Pro Star.

Copies of the exact language of the non-compete agreement provisions is filed in 'documents-original location'.

Will M. and I discussed the issues some. I explained to him that we were preparing to initiate action to attempt to clear up our relationship problems with the three parties involved until such time as the matters pending are more formally resolved. I also discussed his recollection about who he had discussed this matter with at the Department and on what occasions (particularly the Ron Hardle matter).

The following is a summmary of his response:

September 7, 1989: He discussed the Ron

any involvement in the Ron H. matter and recommended that Will M. not push the matter if he wanted to keep his business with the Department (this was not a Department response nor formal response).

September 7, 1989: Will M. introduced the Ron H. matter to Kent N. on the phone.

September 11, 1989: Will M. met with Kent N. to discuss the issue indepth. He informed Kent that legal action may be generated between Pro Star and Ron H., but that it was not the intent of Pro Star to bring the Department into the matter formally or legally. Kent's response was 'we' do not want to get in the middle of the matter- it is a problem between Pro Star and Ron H., the Department is not involved.

October 2, 1989 (Monday):

I met with John Pratt to notify him that the Department would terminate its relationship with his company effective October 2, 1989. I explained the reasons and need for the termination and that we would be happy to consider working with him again as soon as we had some form of confirmation that the issues related to his relationship with Pro Star are resolved.
I also discussed the need for a contract amendment to establish a base for his payments for the period June 30 through October 2, 1989. We agreed that I would notify him when the amendment is ready for his signature so that he could review and sign it.
In this meeting he provided me with his opinions on the relationship issues at the time he contracted with the Department and at present.

Tab 4

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Eric C. Olson (4108)
Attorneys for Defendants
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN P. PRATT, Plaintiff, vs. PRODATA, INC., et al., Defendant.	ORDER GRANTING DIRECTED VERDICT Civil No. 900902742CV Hon. J. Dennis Frederick

At the conclusion of the plaintiff's evidence in this action on March 20, 1991, the defendants moved this Court for a directed verdict as to the plaintiff's Second Claim for Relief in the Complaint and certain elements of the plaintiff's First Claim for Relief. The Court having considered the evidence introduced by the plaintiff, the pleadings in this action, the arguments of counsel and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the defendants' Motion for Directed Verdict is granted as to the plaintiff's Second Claim for Relief and as to all bases for the plaintiff's First Claim for Relief except "improper purpose" and intentional misrepresentation as an "improper means." The Court finds that, as to the Second Claim for Relief, when the plaintiff's evidence

is viewed in the light most favorable to him, reasonable minds would not differ that the noncompetition covenant in the 1988 Subcontract between Prodata, Inc. and John P. Pratt did not supersede the noncompetition covenant in the 1985 Employment Agreement and there was no modification of such obligations as a matter of law. The Court further finds that, with respect to all bases for liability under the First Claim for Relief other than "improper purpose" and intentional misrepresentation as an "improper means," the plaintiff failed to set forth such bases in his Complaint and, when the plaintiff's evidence is viewed in the light most favorable to him, reasonable minds would not differ that these bases cannot be established. The Court further finds that, as a matter of law, negligent misrepresentation cannot serve as the basis for the intentional tort of interference with economic relations.

Pursuant to Rule 50(b) of the Utah Rules of Civil Procedure, all other issues are submitted to the jury subject to a later determination of this Court of the legal issues raised in the defendants' Motion for Directed Verdict upon a timely motion by the defendants' for judgment notwithstanding verdict.

DATED this 27th day of ~~April~~ March, 1991.

J. Dennis Frederick, Judge
Third Judicial District

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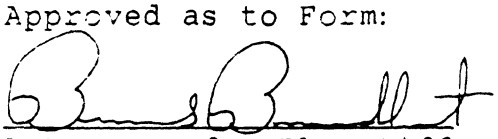
Approved as to Form:



Attorneys for Plaintiff

Tab 5

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN P. PRATT,	:	SPECIAL VERDICT
Plaintiffs,	:	CIVIL NO. 900902742 CV
vs.	:	
PRODATA, INC., et al.,	:	
Defendants.	:	

We, the jury, now answer the following questions as our [redacted] verdict in this case:

1. Did the defendants intentionally interfere with the plaintiff's economic relations with the Utah Department of Transportation?

ANSWER: Yes X No_____

If your answer to question 1 is NO, do not answer questions 2 through 7, and proceed directly to question 8.

---

2. Did the defendants act for an improper purpose in interfering with the plaintiff's economic relations with the Utah Department of Transportation?

ANSWER: Yes X No_____

3. In determining whether the defendants employed improper means in interfering with the plaintiff's economic relations with the Utah Department of Transportation, please answer the following:

a. Did the defendants make a false statement about a presently existing fact to the Utah Department of Transportation?

ANSWER: Yes_____ No_X_

b. Did the defendants know that the statement was false or make the statement without sufficient knowledge?

ANSWER: Yes_____ No_X_

c. Did the defendants, in making the statement, intend to induce the Utah Department of Transportation to act in reliance on the statement?

ANSWER: Yes_X_ No_____

d. Did the Utah Department of Transportation act with justification on the statement?

ANSWER: Yes_X_ No_____

If your answer to question 2 and your answer to any of the four subparts of question 3 ~~and~~ ONE NO, do not answer questions 4 through 7 and proceed directly to question 8.

---

4. Did the defendants' intentional interference with the plaintiff's economic relations with the Utah Department of Transportation proximately cause an injury to the plaintiff?

ANSWER: Yes X No_____

If your answer to question 4 is NO, do not answer questions 5 through 7 and proceed directly to question 8.

---

5. Were the defendants privileged to interfere with the plaintiff's economic relations with the Utah Department of Transportation?

ANSWER: Yes_____ No X

If your answer to question 5 is ~~NO~~, do not answer questions 6 and 7 and proceed directly to question 8.

---

6. Did the plaintiff recognize the risk of harm to himself by reason of the defendants' actions but thereafter intentionally or heedlessly fail to protect his own interests?

ANSWER: Yes_____ No X

If your answer to question 6 is ~~NO~~ YES, do not answer question 7 and proceed directly to question 8.

---

7. State the amount of the plaintiff's out-of-pocket and consequential damages caused by the defendants' interference

with the plaintiff's existing or future economic relations with UDOT.

7.A. If you find punitive damages are appropriate state the amount thereof. $ -0- $ 32,380

8. Did the defendant Prodata waive enforcement of the noncompetition clause in the Employment Agreement?

ANSWER: Yes_____ No X

If your answer to question 8 is YES, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

9. Did the defendant Prodata inexcusably delay asserting the plaintiff's breach of contract, thereby prejudicing the plaintiff?

ANSWER: Yes_____ No X

If your answer to question 9 is yes, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

10. Did the defendant Prodata suffer actual damages by reason of the plaintiff's breach of the noncompetition clause in the Employment Agreement?

ANSWER: Yes_____ No X

If your answer to question 10 is NO, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

11. Did there exist a reasonable relationship between the $25,000 set as liquidated damages in the Employment Agreement and the actual damages to be contemplated as arising from a breach at the time that the Employment Agreement was signed?

ANSWER: Yes_____ No_____

If your answer to question 11 is NO, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

12. State the defendant Prodata's damages proximately caused by the plaintiff's breach of the Employment Agreement.

$_____

Dated this 21 day of March, 1991.

FOREPERSON

Tab 6

INSTRUCTION NO. 18

If the plaintiff proves by a preponderance of the evidence that the defendants intentionally interfered with the plaintiff's economic relations with the UDOT, the plaintiffs then have the burden of proving by a preponderance of the evidence that the defendants, in so interfering, either acted with an improper purpose or employed improper means. The alternative of improper purpose requires evidence that the defendants' predominant or primary purpose was to injure the plaintiff. It is not enough to prove that the defendants intended in the short run to injure the plaintiff if their long range objective was to advance their economic interests. The law offers no remedy for injuries that are solely the result of competition in the rough and tumble of the marketplace. The defendants will be deemed to have an improper purpose only if the plaintiff proves by a preponderance of the evidence that the defendants'actions were motivated by a predominant purpose to injure the plaintiff as an end in itself or, in other words, for the sake of injury alone.

Tab 7

INSTRUCTION NO. 25

Privilege is a complete defense to an action for intentional interference with economic relations. In other words, if proven, privilege will prevent the plaintiff from recovering even if all elements of intentional interference are proven. If you find that the plaintiff has met his burden of proving by a preponderance of the evidence or by clear and convincing evidence as the case may be, each fact necessary to establish a claim of intentional interference with economic relations, then you must consider whether the defendants have proven by a preponderance of the evidence that they were privileged to act as they did. The defendants have the privilege to assert and protect their economic and legal rights. In so doing, the defendants must proceed in good faith. The standard is not whether the defendants were correct or incorrect in believing that the plaintiff had breached his employment agreement, but whether they entertained an honest belief that such was the case. The defendants are also privileged to use appropriate means to cause the nonperformance of an agreement forbidden by statute. If you find that the defendants were privileged to assert their rights under the employment agreement or to prevent an illegal performance, then you must render a verdict in favor of the defendants.

Tab 8

INSTRUCTION NO. 33

The defendant Prodata seeks to recover damages for the plaintiff's alleged breach of his noncompetition obligations under the September 23, 1985 Employment Agreement between the parties. Under Utah law, such noncompetition agreements are enforceable against an employee if supported by consideration, not induced by bad faith, necessary to protect the employer's goodwill, and reasonable as to area and time restrictions. The plaintiff has raised no issue as to these elements and the Court finds that the noncompetition provisions of the Employment Agreement meet these standards. The plaintiff does allege that the defendant Prodata waived enforcement of the Employment Agreement. Waiver is the voluntary, intentional relinquishment of a known right. To prove a waiver of the Employment Agreement, the plaintiff must prove by a preponderance of the evidence:

a. That a right to bring an action against the plaintiff existed.

b. That the defendant Prodata had knowledge of that right and all facts relevant thereto.

c. That by some distinct, unequivocal and decisive act, the defendant Prodata intentionally and voluntarily gave up that right.

Tab 9

Q (By Mr. Broadbent) Okay. Tell us when approximately, if you can fix it as closely as you can, when this first conversation took place in which Will McCoy mentioned John Pratt.

A Would have to be the third week in September 1989, just -- if not on the day, the day prior to my going to work for the Utah Department of Transportation.

Q Do you remember what that day was that you went to the Utah Department of Transportation?

A Not specifically.

Q But it was close to the third week?

A Somewhere around the 20th, something like that.

Q Tell us what you remember about the statement that was made on or about that date by Mr. McCoy about John Pratt.

A The statement I received from Mr. McCoy was that I was to stay away from John Pratt and another gentleman that happened to be out there, Ron Hartle.

Q Did Mr. McCoy at any time make any statement about action he might be going to take against John Pratt?

A I had known that --

MR. OLSON: Your Honor, I object. This isn't responsive and I think the question itself is leading.

THE COURT: It is not responsive.

Mr. Crocker, I want you to listen to the question and answer the question only, and it is leading, that's

agreed, so let's reframe the question and let's see if we can start over.

Q (By Mr. Broadbent) What else do you remember, if anything, that was said in that statement where he said to stay away from John Pratt and Ron Hartle?

A I asked who the gentlemen were. It was indicated to me that they were people that prior to that point had been referred to namelessly either in other casual conversations at our monthly luncheons or, you know, kicked around the office.

Q How could you tell that they were referred to previously maybe without a name?

A I knew they were referred to previously because everyone was basically informed that two contractors had taken contracts away from Pro-Star and their names were not mentioned, and I don't know why I wasn't privy to that until I was to go to UDOT. Then it became imperative that I knew who they were so that I could stay away from them.

Q Was there any explanation as to why you should stay away from them?

It wasn't explicit. Basically every contractor that goes to work for Pro-Star signs a no compete clause. Being informed that John Pratt and Ron Hartle had taken contracts away from Pro-Star means they violated, you know, that compete clause, so to me, it was clear that you stay

A Yes, I did meet him.

Q Do you know whether he was there the entire time you were there?

A Yes, he was there the entire time I was there.

Q So you were there two weeks and he was there for those entire two weeks?

A Yes.

Q After you were done at UDOT, where did you go then?

A After I was done at UDOT, I went back to Pro-Star's office where I stayed for about a month.

Q Did you ever see John Pratt after that?

A Yes, I did.

Q When did you see him?

A To the best of my knowledge, it was about the middle of October and he showed up at Pro-Star's office.

Q And tell us what happened on that occasion.

A I saw John Pratt and, to the best of my knowledge, Ron Hartle go into Will McCoy's office and the doors were shut. Some discussion went on that I have no knowledge of.

Q And who did you see go into the office? Was it just those three people?

A To the best of my recollection, yes.

Q And one of those was Will McCoy?

A Yes.

Q And the other one was?

A John Pratt.

Q And do you think the other one was Ron Hartle?

A I think the other one was Ron Hartle but I'm not sure.

Q Did Will McCoy ever say what happened in that meeting?

A After the meeting, Mr. McCoy came out and basically addressed the individuals that were present, indicating that Mr. Pratt was going to give up his contract at UDOT and pay some form of restitution.

Q But did Mr. McCoy have any particular emotion when he came out? Was he sad? Angry? Happy?

A I would say --

MR. OLSON: Your Honor, I would like a little more foundation, and I think the question should be rephrased such that it relates to this individual's observation as opposed to simply a statement on Mr. McCoy's --

THE COURT: Well, the question is leading. The objection is sustained. Let's form it in a nonleading fashion, Counsel.

Q (By Mr. Broadbent) Okay. Did you see Mr. McCoy express any emotion when he came out from that meeting?

A In my opinion, he was quite pleased. He was smiling, laughing, seemed to be in good spirits.

Q Did it appear to you that he was happy about the

briefly on this matter?

THE COURT: Very well.

(Whereupon, discussion was held at the bench out of the hearing of the jury and the Reporter.)

MR. BROADBENT: Could we approach the bench for just a moment?

(Whereupon, discussion was held at the bench out of the hearing of the jury and the Reporter.)

Q (By Mr. Broadbent) Mr. Crocker, have you now told us everything that you can remember that Pro-Star or Mr. McCoy said to you regarding John Pratt?

A Well, no, not really.

Q Specifically, and we're not interested in things that are just office conversation kinds of things, but tell us anything else that you remember that you haven't told us about already, any other statement that Mr. McCoy has made regarding John Pratt and we'll --

A Okay. What I have to do is back up in time. Not knowing at the time who John Pratt was and not having his name mentioned, a statement at a luncheon by Mr. McCoy and also backed up by Mr. Basham was that contractors had taken contracts, consequently, money away from Pro-Star, that they had violated their no compete clause and Pro-Star intended to make an example of them.

Q Do you remember when that statement was made?

A That statement was made while I was out at Eaton-Kenway about half way through my contract, so that would put it about the middle of June.

Q Okay, so the middle of June of '89 you heard a statement, you heard this statement that you've just described to us?

A Yes.

Q Any other -- tell us first of all who made this statement that you just quoted.

THE COURT: Well, Counsel, seems to me we're being unduly repetitive here. The witness has already testified that it was made by Mr. McCoy. That's the whole purpose of this inquiry, so let's not replow the same ground.

Q (By Mr. Broadbent) You'd indicated Mr. Basham was there and it wasn't clear to me whether this was a discussion or whether it was actually a statement.

A The statement was not made by Mr. Basham.

Q Okay. Any other statements that you can remember Mr. McCoy making about John Pratt?

A The only other statement that I remember being made was a statement that UDOT was a Pro-Star client and was going to remain a Pro-Star client, and therefore by going into Pro-Star on their own, John Pratt and Ron Hartle had opened themselves up to a lawsuit and would basically have to get out.

he was saying had happened or were being done; is that correct? It was hearsay to you.

A No, hearsay is something you hear from someone else in reference to another individual. When Mr. McCoy addressed me and told me to stay away from John Pratt, I think that was all too clear and not hearsay.

Q When he told you that some contractors had taken contracts away from Pro-Star, you didn't know whether that was so or not, it was just something Mr. McCoy was telling you.

A Yes.

Q Okay, and you understood all along and throughout this thing what was motivating those statements was the fact that somebody at Pro-Star believed there had been a violation of some noncompetition clauses, right?

A Yes.

Q And throughout the time as you observed those individuals who were making these statements, Mr. McCoy specifically, it was clear that he sincerely believed that that was the case.

A That's my belief.

MR. OLSON: Yes. That's all I have.

THE COURT: All right.

MR. BROADBENT: Nothing further, your Honor.

THE COURT: All right, Mr. Crocker, you may step

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clients in the state and the subject of John Pratt came up and the gist of the conversation was that Will was unhappy with John Pratt's conduct of terminating his contract and going to work directly for a client. He felt -- his comments were the frame that it was unethical and he was quite unhappy with John.

Q From being at Pro-Star in this two-month period, did you know where John Pratt was working before he terminated with Pro-Star?

A It was up at an office there on Social Hall Avenue. I believe it was the Department of Transportation or -- I'm not sure just what department at the time.

Q So you're not sure what department, but Mr. McCoy was upset because he thought that John Pratt had done something wrong?

A Yes.

THE COURT: Counsel, there's no reason to restate the answer of a witness. He's your witness.

MR. BROADBENT: I have no further questions, your Honor.

THE COURT: All right, you may cross-examine.

MR. BROADBENT: Excuse me. Before we do that, I'd like to ask the witness to, if you would, place on this time line -- we'll use yellow -- the time frame in which this conversation with Mr. McCoy took place.

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exception.

THE COURT: Sustained.

Q (By Mr. Broadbent) Did you later have any other conversations with Will McCoy in which John Pratt was mentioned?

A Yes, I did.

Q When was the next conversation that you remember having with him?

A I believe it was on May 3rd, 1989.

Q And what did Mr. McCoy say on that occasion about John Pratt?

A He was telling me that he believed that I should not have any dealings with Mr. Pratt because he believed that he was a bad influence on me.

Q Did he say anything else?

A He said that he had done several things that were professional unethical and that he -- he said that he could not elaborate, but he said that he had done things that were far worse than anything I knew about.

Q Did you know about anything unethical that Mr. Pratt had done?

A The only thing that I had known about that could even be construed in my mind as touching upon a lack of ethics was his transition from being a Pro-Star employee to a subcontractor.

Q There was something about that that you thought was inappropriate?

A I thought that it was.

Q That isn't in this time frame, though, is it?

A That was -- wasn't that much earlier?

A It was, yes, in fact, it was.

Q You're talking about when he changed from an employee to a subcontractor?

A That was at the time that I first became a Pro-Star employee that it occurred.

Q And that actually happened before you were employed by Pro-Star; isn't that right?

A Yes, it had.

MR. BROADBENT: I have nothing further, your Honor.

THE COURT: All right, you may cross-examine.

CROSS-EXAMINATION

BY MR. OLSON:

Q Mr. Broadbent neglected to ask you what was it that you thought in your mind might be possibly unethical Mr. Pratt had done in relation to his switching from an employment agreement to a subcontractor?

MR. BROADBENT: Your Honor, I don't think there's any relevance.

THE COURT: May not be, Counsel, but you raised it on direct examination. The objection's overruled. You may

inquire.

THE WITNESS: I believe that the client had some pressure put upon them to act according to John's wishes because he was in charge of the project and they couldn't afford to lose him.

Q (By Mr. Olson) So Mr. Pratt, in your experience as well when you were with Employment Security, was a vital part of what was going on there as far as Pro-Star was rendering services for Employment Security; is that correct?

A He was the foremost resource as far as this project.

Q And your understanding was that if he would have walked away back when he had the employment agreement and done what -- and as he threatened to do, that would have created a severe problem for Pro-Star in terms of staffing and making the client happy in that particular situation; isn't that correct?

A It's conceivable, yes.

Q And so the unethical thing you thought perhaps was there was something a bit coercive in terms of his seeking a subcontract where he was such an essential part of the operation and things were sort of in the middle of getting done; is that correct?

A Yes.

Q Okay. Did Mr. McCoy ever explain to you what he

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invited into and we were asked to go to another place, and we did.

Q You didn't hear anything that happened in that meeting?

A No, sure didn't.

Q Did you see Mr. Neal Christensen come out --

A No, I did not.

Q -- of that meeting?

Did you see who went in besides Mr. Neal Christensen and Will McCoy?

A No, no.

Q Did Mr. McCoy come out after that meeting?

A Yes, he did.

Q Did you talk to him after the meeting?

A We chatted.

Q Did you talk to him about the meeting?

A Yeah, I was interested in what was going on, of course. I was pretty dedicated to Pro-Star at that time and their business was my business, so yeah, I was interested in what was happening.

Q Tell us what was said and by whom relating to that meeting.

A To the best of my recollection, it was stated that Mr. Pratt and another gentleman had broken their contracts, which is a no-competition contract with Pro-Star, and had

sought contracts on their own behalf, and that Pro-Star couldn't afford to let that happen and that's the reason they signed a no-competition agreement with their employees, and that they really didn't want that to happen and be part of the business and they had to make some kind of a statement to the rest of the business world.

Q Was there anything else that you remember Mr. McCoy saying about his meeting with Mr. Christensen?

A He just said that UDOT was in an uncomfortable position but were willing to work it out in a businesslike fashion.

Q Did he say what kind of a fashion they were going to work it out?

A No, I wasn't privy to any of that information.

Q Do you remember Mr. McCoy saying anything else about his meeting with Mr. Christensen?

A No, that was pretty much his business at his level.

Q Did Mr. McCoy ever mention John Pratt?

A Yes, he did.

Q Tell me in what time frame you remember Mr. McCoy saying something.

A From before September, it started, I guess, when Mr. Pratt left the -- his original contract and went out to DOT, there was a little scuttlebutt around.

Q And when was that?

A That would be three or four months prior.

Q Prior to what?

A Prior to September. It was in the summer sometime.

Q Okay, so you remember some discussion there. What was the substance of that discussion?

A The substance was that --

MR. OLSON: Your Honor, I don't think there's enough foundation for this testimony.

THE COURT: Well, I'm not sure, Counsel, that there is, either. I think we need to, as best we can, pinpoint when it occurred, who was present and then what was said by whom.

Q (By Mr. Broadbent) Okay. You're saying that this conversation took place about three months before September, so that would have put it in what, June?

A Correct.

Q Of '89?

A Somewhere around there.

Q And who was there besides yourself?

A At this point it was some of the project directors that were being brought on board. We had a weekly meeting and there was a little discussion about it. There was more discussion at a later time towards September on kind of like a case study on the whole thing, and our information was that Mr. Pratt had broken his agreement with Pro-Star.

Q Do you remember any other discussions with Will McCoy about John Pratt?

A Nothing was really said derogatory about Mr. Pratt the whole time. It's just business practice.

Q Now, as you sit here today, have you told us everything you can remember about what Mr. McCoy said about John Pratt or what he said about his meeting with Mr. Neal Christensen?

A To the best of my knowledge, yeah.

Q Let me have you refer, if I could, to your deposition, Mr. Christensen. I'm looking at page 32.

Your Honor, I don't know how we're going to do this without an original, but I move to publish.

THE COURT: Well, is the document given to the witness a copy of his deposition?

MR. BROADBENT: It is. Shall we hand it up?

THE COURT: Well, no, I needn't see it.

MR. OLSON: I'm going to object at this time. I don't know what use he intends to put this deposition to, but Mr. Christensen's given us the benefit of all his recollection as it exists to date. If it's impeachment, I don't know what's to impeach.

MR. BROADBENT: He apparently had a better recollection when his deposition was taken.

THE COURT: Well, then, let's do it this way. If

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Q (By Mr. Broadbent) When is the next time that you remember Mr. McCoy saying anything about John Pratt, or was there another occasion where he said something?

A I don't think he ever talked to me anymore about John Pratt.

Q Okay. Did you sign a contract when you started working for Pro-Star?

A Yes.

Q And did that contain a covenant not to compete with Pro-Star?

A Now, you're talking two things. You're talking about when I started with Pro-Star and then also when I was as a subcontractor to Pro-Star, so there really was two contracts.

Q Okay.

A Okay.

Q All right, so you signed both of them?

A Yes.

Q And I guess originally you signed an employee agreement; is that right?

A That's correct.

Q And then later on you signed a subcontractor agreement?

A That's correct.

Q Did there come a time when you stopped doing

circumstances was and I told him the same thing.

Shortly after that, or I think it was the same telephone conversation, I got a call -- I talked to Bill Basham who is the owner of Pro-Star/Prodata and at that time he indicated that he would take whatever means he could to get me out of UDOT.

Q Now, after you stopped doing subcontract work for Pro-Star, did you continue then doing computer consulting work?

A Yes, I did at UDOT.

Q And did you have an arrangement or a contract with UDOT?

A Yes.

Q Did you have a contract with them?

A Yes.

Q And following this discussion that you just testified about with Mr. McCoy and Mr. Basham on the telephone, was your contract with UDOT terminated?

A Shortly thereafter, yes. There were some things that happened in the meantime, though, because I had interaction and had interaction all along with my attorney concerning the legality of what I was doing and I was assured that it was perfectly legal.

Q When was your contract at UDOT terminated?

A On October 2nd, 1989.

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the contracts that you had entered into with Prodata?

A I don't recall that we specifically talked about it, but I'm sure they were aware of that.

Q You don't recall a specific conversation?

A I don't recall a specific conversation.

Q Now, if I had some dots and I wanted to put a dot at the point in time where the one year expired from when you terminated the employment agreement, that would be approximately the line that commences May 1; isn't that right? That was one year after you terminated employment; is that right?

A Yes, that's correct.

Q And so assuming that the jury or the law doesn't agree with your perception that these contracts superseded each other, you would have had an existing obligation not to compete through the end of April of 1989; isn't that true?

A That's right.

Q And when you went to work for UDOT, you at least recognized the potential that those two months might fall under the noncompetition provision that was included in your employment agreement, didn't you?

A I didn't consider that to be a factor at all.

Q You hadn't discussed that?

A That agreement had been superseded.

Q You hadn't discussed that with Prodata to find out what their view of it was, did you?

A That's right --

Q And so --

A -- not to my knowledge.

Q You have no personal knowledge that Mr. McCoy ever was privy to what Mr. Christensen may have said in response to you in your letter of November 1989, do you?

A That's correct.

Q And when the final letter was sent, which was the February 16, 1990 letter which is Exhibit 10, once again, the letter was to you, Mr. Pratt, from Mr. Christensen, director of administrative services out at UDOT, right?

A Yes.

Q There was no copy sent to Mr. McCoy or anyone at Pro-Star?

A To my knowledge.

Q So your dialogue after that first meeting with Mr. McCoy and Mr. Zaba was exclusively with UDOT?

A I was told by Mr. McCoy that I would need to talk to you if I had anything to say to Pro-Star.

Q And did you direct your attorney to speak with me?

A Yes, I did.

Q And did your attorney advise you of anything that had been said in conversations between him and me?

A Nothing other than your initial position that I needed to pay money in order to get back to UDOT.

Q So you were told that a dollar offer of settlement had been made on behalf of Pro-Star, right?

A Yes.

Q And you were fundamentally opposed to paying a penny?

A Absolutely, absolutely.

Q And you'd rather be in this litigation than pay a penny; is that right?

A I would rather have had Pro-Star act responsibly and let me get on equal economic footing before we discussed *any problem they had with me. I would rather they had come* to me directly, yes.

Q But the fact is, you would rather be in litigation than pay a penny to Pro-Star.

A I would not pay money to someone who had caused me damage in order to extort that money from me, in my words.

Q That's not the question.

A Rather than do that, yes, I would rather be here.

Q So you felt it was extortion? Is that your word, extortion?

A I felt that they were -- that they got me kicked out of UDOT, that they put me at an economic disadvantage and then demanded money before I could go back on an issue that they never felt any real -- that there was any real issue or at least to my knowledge, they never had contacted me. There

didn't seem to be any issue until they did that damage.

Q But when the topic came up, they told you how the problem could be solved, didn't they?

A Yes.

Q And that was to pay around $4,000, right?

A Yes, they did.

Q And you never made a counter offer so nobody even negotiated the matter, did they?

A No, we did not negotiate the matter, no.

Q When you came to Pro-Star back in May of 1988 and said, "I want $28 an hour," they negotiated with you and a figure was arrived upon that was mutually acceptable by both of you, didn't you?

A I think it would have been unlikely that had I gotten them kicked out of the Department of Employment Security and then asked them --

Q I want to --

THE COURT: Just a minute, folks, you've got to speak one at a time.

MR. OLSON: Your Honor, I would like the witness to answer the question that I asked him.

THE COURT: Mr. Pratt, I want you to listen to the question and answer the question only.

THE WITNESS: Yes, sir.

THE COURT: Your attorney will be able to elicit

from you any information he feels is necessary.

Q (By Mr. Olson) And my question was simply this, that when you asked for $28 an hour in May of 1988 as part of the new subcontract, Prodata negotiated with you and you came up with a mutually agreeable figure between yourselves as to what the payment should be under the subcontract, right?

A That's correct.

Q But when Prodata offered you an initial sum of a possible settlement and they never said that it was a drop-dead offer, that is, that you either accept this or nothing, you refused to even come back with anything, didn't you?

A I felt the circumstances were dramatically different, Mr. Olson.

Q Okay, but you didn't come back with anything, did you?

A I did not.

Q And in fact, after that moment in time, you never had any more discussions and to your knowledge, the attorneys had no more discussions about the possibility of resolving this matter short of litigation; is that right?

A That's correct.

Q And you recognized at that time that the consequence of not resolving the matter was you would not get back the work at UDOT unless you could persuade Mr. Christensen to the contrary.

A That's right.

Q Okay, and you knew that not going back to work at UDOT might result in your being deprived, in your own testimony, deprived of contracts exceeding $84,000; isn't that correct?

A I had no knowledge of any figures at that time.

Q But you recognized there was some --

A I recognized that there was some dollars involved.

Q Tens of thousands of dollars?

A Yes.

Q And you also knew, did you not, that Mr. Hartle, in fact, did make a settlement with Pro-Star and he went back and worked at UDOT; is that correct?

A That's correct.

Q Now, Computer Solutions, is that a corporation?

A No, it's not.

Q Is it a partnership?

A It's a sole proprietorship.

Q It's basically a name you call yourself; is that correct?

A It is a business I started that I own individually, yes.

Q It doesn't have separate shares of stock or --

A It does not.

Q -- certificates? It's basically a dba, right?

done with respect to UDOT, other than rumors, whatever you'd heard from people?

A Everything that I had was hearsay. That's all I could get.

Q You weren't in any of the meetings with Mr. McCoy or Mr. Christensen; is that correct?

A That's correct.

Q And you weren't privy to whatever Mr. Findlay said, did or thought when he was making the decision to terminate you; is that correct?

A That's correct.

Q And when you were advised you were terminated, it wasn't, "Mr. Pratt, you're out of here and never come back," it was, "Mr. Pratt, you're out of here, but if you can resolve things with Prodata, you're welcome to come back."

A Yes.

Q Those were the terms. It wasn't just cutting you loose; isn't that correct?

A That's correct.

MR. OLSON: That's all I have.

MR. BROADBENT: Nothing further, your Honor.

THE COURT: All right, you'd better step down, Mr. Pratt, while you have a chance.

Call your next witness.

MR. BROADBENT: Your Honor, we have a need to call